U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 April 2007

CASE NO.: 2006-LCA-00011

In the Matter of:

SRIKANTH DOLA
Prosecuting Party,

v.

INFOMERICA,
Respondent.

Appearances:

Srikanth Dola
Pro Se

Errol Keith
For Respondent

Before: Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER

This matter arises out of a determination by the Administrator, Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor ("Administrator") under the enforcement provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. It results from a request for a hearing filed by Srikanth Dola, Prosecuting Party ("Complainant").

PROCEDURAL BACKGROUND

On November 7, 2005, Complainant filed a complaint with the Wage and Hour Division alleging that Respondent Infomerica ("Respondent") had violated provisions of H-1B non-immigrant worker program.[1] RX 4. On February 23, 2006, the Administrator issued a determination finding that no violation had occurred. RX 5. Complainant disagreed with the Administrator's conclusion, and by letter dated March 9, 2006 to the Chief Administrative Law Judge, he timely requested a hearing before the U.S. Department of Labor's Office of Administrative Law Judges ("OALJ"). This case was referred to me on March 17, 2006.

[1] The complaint was dated October 12, 2005 but apparently was not received by the Wage and Hour Division until November 7, 2005. RX 4.

A hearing on this matter was held on June 26, 2006, in Kansas City, Kansas. Complainant appeared at trial and proceeded *in pro se*. Respondent was represented by Errol Keith, Esquire. At the hearing, Complainant's exhibits ("CX") 1, 3 and 4, and Respondent's exhibits ("RX") 1 - 15 and 17, were admitted into evidence.[2] TR at 10, 15, 140.

Complainant and Kamal Rao, Respondent's payroll manager and custodian of records, testified at trial. In addition, Respondent submitted the deposition testimony of Tyrone Thorpe, Wage and Hour Investigator for the U.S. Department of Labor. RX 17.

Complainant filed a closing brief on August 25, 2006, which is hereby admitted into evidence as Administrative Law Judge exhibit ("ALJX") 1. Respondent filed a closing brief on August 29, 2006, which is hereby admitted into evidence as ALJX 2.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. On June 25, 2004, a Labor Condition Application was filed by Respondent on behalf of Complainant. TR at 16.

2. Complainant was employed by Respondent from June 28, 2004 through March 11, 2005. TR at 19.

3. Complainant was employed by Respondent to analyze, design, develop and implement computer software systems. TR at 20.

4. The actual work performed by Complainant while employed by Respondent occurred in Lahaska, Kansas, at Sprint, a client of Respondent. TR at 20.

5. Complainant's resignation from Respondent's employ was effective on or after March 12, 2005. TR at 22.

Because I find that substantial evidence in the record supports the foregoing stipulations, I accept them.

ISSUES

1. To what salary was Complainant entitled during employment with Respondent?

2. Was Complainant entitled to overtime pay?

[2] There was some confusion as to the number of exhibits offered by Complainant. Initially, CX 1-73 were offered and admitted into evidence without objection. *See* TR at 7-10. Near the close of trial, the parties compared exhibits in order to identify and withdraw duplicative documents from evidence. TR at 138-40. During that process, it was determined that Complainant actually intended to offer four exhibits consisting of several pages each. TR at 140. Accordingly, Complainant withdrew CX 5-73. TR at 141. In addition, Complainant withdrew CX 2 in favor of RX 8. Respondent originally offered RX 1-17, and later agreed to withdraw RX 16 in favor of CX 3. TR at 140.

3. What is the effect of Respondent's deduction of $6500 from Complainant's wages to recoup alleged pay advances/loans?

4. Did Respondent provide proper notice of the Labor Condition Agreement?

5. Is Respondent liable for a civil monetary penalty for any violations of the Immigration and Nationality Act?

CONTENTIONS OF THE PARTIES

1. Complainant

Complainant contends that a representative of Respondent orally agreed to pay him $37.44 an hour while he was working on a student visa, and $33.60 an hour after the effective date of his H1-B visa on December 15, 2005. Complainant further contends that Respondent's representative agreed to pay Complainant for overtime. He alleges that Respondent has not paid the agreed hourly rate for both regular hours and overtime. ALJX 1.

Complainant next alleges that Respondent compensated him in the amount of $6,500 for overtime that he worked, and then recovered that amount of this wages after he informed Respondent of his intent to terminate his employment on February 28, 2005. He further contends that his pay was reduced as a penalty for leaving his job with Respondent.

Finally, Complainant asserts that, although his H1-B visa was approved as early as July 2004, Respondent did not mail a copy of the visa documents to Complainant until sometime in February 2005 in violation of H-1B program regulations. ALJX 1 at 2.

2. Respondent

Respondent contends that Complainant's salary was $52,000 per year, which breaks down to a rate of $25.00 an hour, and that Complainant also received a per diem allowance which was not part of his salary. ALJX 2 at 10. Respondent asserts that it paid Complainant for all of the hours which he documented for 2004 and 2005, inclusive of overtime hours, at the hourly rate of $25.00 per hour. ALJX 2 at 13. Respondent further asserts that Complainant's position was exempt from overtime requirements therefore it was not required to pay Complainant for any overtime that he worked. ALJX 2 at 2-4.

Respondent submits that it provided pay advances totaling $6500 at Complainant's request, and denies that these were salary payments for overtime. Respondent asserts that it was entitled to, and did, recoup the $6500 from Complainant's wages.

Finally, Respondent contends that it substantially complied with H-1B regulations by posting an electronic copy of Complainant's Labor Condition Agreement at his place of employment. ALJX 2 at 11.

STATUTORY FRAMEWORK

The Immigration and Nationality Act's ("INA") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized occupations in the United States.[3] 8 U.S.C. § 1101(a)(15)(H)(I)(b). The process for hiring an H-1B worker is set out in detail in 20 C.F.R. Part 655, Subparts H and I. It requires an employer who wants to employ a non-immigrant worker to file a Labor Condition Application ("LCA") with the U.S. Department of Labor ("DOL") for certification that certain criteria have been met. In the LCA, the employer must represent, *inter alia*, the number of employees to be hired, their occupational classification, the actual wage rate, the prevailing wage rate and the source of such wage data, the period of employment, and the date of need. 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.730-734. In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.730(d).

Once the LCA is certified by DOL, the employer submits a copy of the certified LCA along with the non-immigrant worker's visa petition to the Immigration and Naturalization Service ("INS") to request an H1-B visa for the worker. 8 U.S.C. § 1101(a)(15)(H)(I)(b); 20 C.F.R. § 655.700. Upon INS approval, the non-immigrant worker is admitted to the United States on a temporary basis under an H-1B visa.

Employers are required to pay H-1B workers the required wage beginning on the date on which the worker "enters into employment with the employer." 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to "enter into employment" when he first makes himself available to work or otherwise comes under the control of the employer. *Id.* § 655.731(c)(6)(i). Alternatively, even if the worker has not yet "entered into employment," where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. *Id.* § 655.731(c)(6)(ii). The H-1B worker is eligible to work for employer upon the date of need set forth in the approved H-1B petition filed by the employer, or the date of adjustment of the non-immigrant's status by INS, whichever is later. *Id.* The employer's duty to pay the required wage ends when a bona fide termination occurs. *Id*. § 655.731(c)(7)(ii).

FACTUAL BACKGROUND

Complainant's Employment with Respondent

Respondent is a computer consulting company which employs approximately 100 Computer Programmer Analysts and places them at client sites throughout the United States. TR at 28, 89. Respondent has offices in North Carolina and Iowa. *See* RX 4 at 3; RX 5 at 4.

[3] "Specialized occupation" is defined by the INA as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1).

Complainant, a citizen of India, received a Master's degree in Computer Science from University of Texas in December 2003. TR at 41-2; RX 4. After completing his degree, Complainant participated in Optional Practical Training under an F-1 student visa. He became employed by a software consulting company Trinuke in March 2004. TR at 42, 44. Through another company called Apollo Consulting ("Apollo"), Trinuke placed Complainant in a job as a Program Analyst at the Sprint telecom facility in Overland Park, Kansas. TR at 42, 44-6, 48-9.

Complainant's salary at Triunke was $1,000 per month plus $1,000 for monthly per diem, which was reflected on a different pay stub than his salary. TR at 50. It is not clear from the record how often he received these payments. *See* TR at 50. Complainant understood that the per diem was to cover expenses like rent and meals for the first four months of the Sprint job. TR at 50.

Complainant's job at Sprint involved the design, testing, implementation and deployment of various software programs. He was also involved in accepting, transforming, and loading data from and to databases. TR at 44. He testified that he had to use the knowledge acquired during his Master's program to perform some of his job responsibilities. TR at 45, 48.

Complainant's F-1 student visa remained valid through January 21, 2005. TR at 42. Complainant testified that if he had been unable to obtain an H-1B visa by that date, he would have had to apply for a different graduate degree or leave the United States and come back again. TR at 42. Because Triunke would not process his H-1B visa application, Complainant decided to transfer to Respondent. TR at 45-6, 48.

Respondent ultimately sponsored Complainant for an H-1B visa. TR at 42. On June 24, 2004, Respondent filed an LCA on Complainant's behalf. CX 3. Complainant started working for Respondent on June 28, 2004 under a student visa. TR at 19, 49-50. On July 10, 2004, INS issued a notice approving H-1B status valid from December 14, 2004 through December 13, 2007. CX 3 at 5.

Respondent hired Complainant as a Computer Systems Analyst to analyze, design, develop and implement computer software systems. TR at 20; CX 3 at 2, 4. Complainant testified that he set up a relationship between Respondent and Apollo. TR at 49. As a result, the Sprint job on which Complainant previously worked was transferred to Respondent through Apollo. *See* TR at 42, 45, 48. The actual work performed by Complainant while he was employed by Respondent occurred in Lahaska, Kansas, at the Sprint facility. TR at 20.

Complainant was employed by Respondent from June 28, 2004 to March 11, 2005. TR at 19. During this period, compensation for Complainant's services was structured such that Sprint paid Apollo, Apollo paid Respondent, and Respondent paid Complainant. TR at 80. Apollo paid Respondent $48.00 an hour for Complainant's services including overtime. TR at 80, 91-92, 130-31. Complainant did not receive any payments directly from Apollo. TR at 80.

Complainant resigned from his job with Respondent via an e-mail dated February 28, 2005. RX 1; CX 1 at 15. Complainant worked and submitted time sheets to Respondent through March 11, 2005, and his resignation was effective on or after March 12, 2005. TR at 22. After

he left Respondent, Complainant worked directly for Apollo for four months. TR at 43. At trial, he had been working for eBay as a CTF software engineer for eleven months. TR at 43.

Complainant's Contacts with Respondent

Complainant testified that all of his communications with Respondent were either through Kamal Rao ("Kamal") or a man called Mehendar, who went by the name of Mark ("Mark"). TR at 32. Complainant testified that Kamal was his contact for "time sheet related stuff and pay-related stuff." TR at 51. Complainant mailed his time sheets to Kamal. TR at 65.

Kamal testified that he manages Respondent's payroll accounting and time sheets and maintains employee files. TR at 87, 117. He has worked for Respondent for five or six years. TR at 117. When asked, Kamal agreed that he was Complainant's supervisor, saying, "Yes. I'm the one who takes care of everything." TR at 117.

Mark did not testify in these proceedings. Complainant does not know Mark's last name. TR at 32. Complainant testified that he was informed and believed that Mark was an "owner" or "partner" in Respondent. TR at 32. He further testified that Mark was his contact at Respondent for setting up his employment and for H-1B visa information after he was hired. TR at 54. Complainant contacted Mark via e-mail at "mark@infoamericainc.com." *See* TR at 32-3; CX 1 at 1, 2, 6, 7, 8, 15. Complainant testified that Mark contacted him to begin the H1-B visa application process, and that Complainant e-mailed his resignation notice to Mark. TR at 32.

Kamal testified that Mark's full name is Mark Rao, Mark Rao Mehendar, or "Mark Rao or Mehendar." TR at 88, 130. Kamal further testified that Mark is his uncle, and that Mark was not "fully" responsible for getting Kamal his job with Respondent. TR at 130. When asked how long Mark had been associated with Respondent, Kamal answered, "I know him well but not very well on some things." TR at 130.

Kamal testified that Mark is an independent contractor, not an employee of Respondent, and that Mark does not have any ownership interest in Respondent. TR at 88-90, 130. Kamal testified that Respondent has four or five independent contractors, including Mark, who recruit employees for placement at Respondent's clients. TR at 88. He further testified that the contractors may be involved with processing H1-B applications for Respondent's employees. TR at 88. Kamal reiterated that Mark has never been an employee of Respondent. TR at 130.

Employment Agreement

In June 2004 or sometime thereafter, Complainant received from Respondent a seven-page document entitled "Employment Agreement." TR at 52-3; RX 3. Complainant read the seven pages of the Employment Agreement. TR at 55.

Kamal testified that he recognized the Employment Agreement, including the eighth page of the agreement entitled "Addendum A," as the agreement he mailed to Complainant. TR at 117. Addendum A is dated June 25, 2004, and provides that Complainant's assignment is with Sprint in Overland Park, Kansas; the assignment is expected to be 3 to 6 months in duration; and

the compensation is $21.63 per hour. RX 3 at 8; TR at 39-40. It is not clear whether Complainant received Addendum A at the time he received the other seven pages of the Employment Agreement. *See* TR at 52-7.

Complainant testified that he had reviewed Addendum A by the time of trial and that the stated compensation rate of $21.63 was not acceptable to him. TR at 55-6. *See also* TR at 57-8. Complainant asserts that the wage of $21.63 an hour contained in Addendum A is not the amount Respondent agreed to pay him. TR at 39-40. Complainant never signed or returned the seven-page Employment Agreement document or Addendum A. TR at 55-6, 58.

Complainant testified that he contacted Mark after receiving the Employment Agreement. TR at 53. He further testified that he had requested a formal employment agreement with the correct wage rate and how it was agreed upon. TR at 53-4. Complainant explained that "he was reminded by Mark" that if he moved to a different project after the Sprint project, he would be paid 70% of what Respondent received from its client for Complainant's services. TR at 53-4. Complainant reiterated that he was told that Mark was his contact at Respondent, and he testified that Kamal told him to contact Mark with questions about the wage agreement. TR at 54-5.

The Labor Condition Application

On June 4, 2004, Mark sent an email to Complainant requesting various documents in order to begin the process of applying for an H1-B visa. CX 1 at 1; TR at 32.

On June 24, 2004, Respondent filed an LCA on behalf of Complainant. CX 3. The LCA provides for a wage rate of $41,536 per year, and a period of employment from December 14, 2004 through December 13, 2007. CX 3 at 7. The LCA indicates a work location of Dubuque, Iowa,[4] where the prevailing wage in 2004 was stated to be $31,366. CX 3 at 7. The LCA also indicates a subsequent work location of Durham, North Carolina, where the 2004 prevailing wage was stated to be $43,722. CX 3 at 8. No hourly rate was stated in the LCA.

On July 10, 2004, INS issued a notice approving Complainant's H-1B status, valid from December 14, 2004 through December 13, 2007. CX 3 at 5.

Complainant's Requests for H-1B Visa Documents

On July 26, 2004, Complainant sent an e-mail to Mark asking about the status of the H-1B visa application. CX 1 at 6, 8. That same day, Mark responded by e-mail that the visa had been approved and the papers were at the office of Respondent's attorney and would shortly be forwarded to Respondent's home office in North Carolina. *Id.*

On January 13, 2005, Complainant sent an e-mail to Kamal indicating that he wanted to have his H-1B visa stamped in Matamoros, Mexico. He requested that Kamal send him "the necessary documentation and information I need to know." RX 11 at 2. On January 20, 2005, Complainant sent another e-mail to Kamal indicating that he needed the H-1B visa papers

[4] Contrary to the LCA, the Petition for a Nonimmigrant Worker (Form I-129) provides that Complainant will work in "Durham, NC and the surrounding area" and "may transfer to Dubuque, IA at a later date." CX 3 at 2.

because he was "planning to go to Matamoros Embassy in Mexico," and might be visiting India for his sister's wedding. CX 1 at 14. No responses to these emails are contained in the record.

Kamal testified that Respondent generally mails H-1B documents to the H-1B worker one to two weeks after he begins employment. TR at 103. He did not recall when Respondent mailed Complainant's documents, but thought they were sent in January 2005. TR at 103.

Kamal further testified that as a business practice, Respondent does not provide H-1B documentation to the H-1B worker before the visa's effective date. TR at 104. He explained that this is because the employee might "jump because they already had been an H1 [*sic*] he wanted to transfer to some other company." TR at 104. Kamal elaborated that Respondent will provide the H1-B documentation at an employee's request in order to enable the employee to transfer to a different company. TR at 104.

When asked if Complainant would have needed the H-1B documents to visit India on December 15, 2005, Kamal testified, "December 15th, if you need it, you may acquire it." TR at 104. Kamal agreed that Complainant had e-mailed requests for the documents before December 15, 2005. TR at 104-5. Kamal went on to explain that once the H-1B visa is approved by INS, it is sent to "accounting" for copying then forwarded to the "administrative office." TR at 105. The administrative office mails it to the non-immigrant worker. TR at 105.

Complainant testified that he received a hard copy of the LCA sometime in February 2005.[5] TR at 58. He noted that the wage listed on the LCA was $41,536 per year, and contacted Kamal to protest that the compensation to which he orally agreed was not included in the LCA, and that the LCA reflected a wage which was less than the agreed rate. TR at 59-60. Complainant asserts that at the time he received the LCA, his wage rate was $33.60 an hour pursuant to an agreement he had with Mark. TR at 60.

Alleged Oral Agreement as to Wage Rate

Complainant testified that he had an oral agreement with Mark that Respondent would pay Complainant 78% of $48 an hour (the rate at which Apollo paid Respondent for Complainant's services), for as long as he worked under a student visa. This amounts to $37.44 an hour. TR at 33. Complainant points out that $37.44 an hour, multiplied by 80 hours, yields $2995.20. TR at 33. In support of the existence of the alleged agreement, Complainant asserts that $2995.20 is close to the $2995 in gross pay he received on a bi-weekly basis from June 28, 2004 through the pay period ending December 10, 2004. TR at 33; RX 8 at 1-12.

Complainant further testified that under his agreement with Mark, Respondent was to pay Complainant 70% of $48 an hour, or $33.60 an hour, once his H-1B visa became effective on December 15, 2004. *See* TR at 26-7 (Complainant's opening statement); TR at 40, 53-4. Complainant points out that $33.60 an hour, multiplied by 80 hours, yields $2688. Complainant asserts that he received $2680 in gross pay from December 11, 2004 through the pay period

[5] Complainant's testimony that he received the LCA documents in February 2000 appears to be mistaken. TR at 58.

ending February 4, 2005, which he says concurs with his claim that he was promised $33.60 an hour. TR at 40.

Complainant testified that after he resigned he e-mailed Kamal and detailed how much money he believed Respondent owed him based on the agreement with Mark. TR at 35; CX 1 at 21. In further support of the alleged agreement, Complainant points out that he did not receive any response from Kamal or anyone else with Respondent denying the accuracy of the claimed wage rate or the calculations of the amount due. TR at 35.

Complainant admits that he has no written proof or other evidence of the alleged agreement with Mark other than the computations and circumstances outlined above. *See* TR at 70. It is not clear from the record at what point in time the alleged agreement was entered into.

Complainant's Earnings Statements

a. "Regular"

Complainant started working for Respondent on June 28, 2004, and resigned by notice given on February 28, 2005. TR at 19, 49-50. However, he continued to work and submitted time sheets to Respondent through March 11, 2005. TR at 65.

Complainant's earnings statements show that he was paid $2000 for 80 hours on a bi-weekly basis from June 28, 2004 through the pay period ending March 4, 2005. *See* RX 8 at 1-20; TR at 60. The earnings statements describe these payments as "Regular." *Id.* The bi-weekly payments translate to $52,000 per year, $1000 per week, or $25.00 per hour. *See* TR at 67.

Kamal testified that Complainant's salary was $2000 bi-weekly, or $52,000 a year. TR at 120, 122. Kamal acknowledged that this is higher than the wage rate of $41,538 a year which is identified in the LCA. TR at 120, 122. He explained that Respondent determined that it would pay Complainant $52,000 annually based on his qualifications and the project on which he was working. TR at 120-21, 122. Kamal testified that other employees working in similar capacities are paid approximately the same amount. TR at 121. He went on to explain that Respondent's policy is to avoid paying new employees more than existing employees with similar skills who are working on similar jobs. TR at 121. Kamal denied that Respondent ever agreed to pay Complainant more than $52,000 a year in salary. TR at 128.

Review of Complainant's earnings statements reveals that in some instances, he has two earnings statements covering the same pay period, with different check numbers and different net amounts. *See* TR at 85-6, 101-2; RX 8 at 17-24. In addition, Complainant testified that he received paychecks from Respondent even after he had resigned from the company, and Respondent had not answered his inquiry as to why this happened. TR at 41.

Kamal testified that Respondent issued Complainant a paycheck for the pay period ending April 1, 2005, even though Complainant was no longer working for Respondent. TR at 98. Kamal explained that Respondent wanted to pay Complainant for the total number of hours he had worked. TR at 98-9. According to Kamal, Respondent's payroll system prevents an

employee from earning more than 80 hours in a pay period, so Kamal processed one paycheck for 80 hours and second paycheck for an additional 30 hours in order to compensate Complainant for all of the hours he worked and for all hours, including overtime, paid by Apollo. TR at 99, 131-33. Kamal further explained that in calculating the amount due Complainant, Kamal made a mistake and overpaid him by 28 hours. TR at 99, 133. The last paycheck issued by Respondent was paid on April 20, 2005, covering the pay period ending April 1, 2005. TR at 132; RX 8 at 23.

Complainant's W-2 forms show reported gross earnings of $24,000 for 2004 and $21,475 for 2005, for a total of $45,475. TR at 67-8; RX 9.

b. "Ntax"

Complainant's earnings statements also reflect payments described as "ntax." RX 8; TR at 60. The ntax amount was $995 from June 28, 2004 through the pay period ending December 10, 2004. RX 8 at 1-12. Accordingly, Complainant's gross pay for these periods was $2,995. *Id.* Beginning on December 11, 2004 and continuing through the pay period ending February 4, 2005, the ntax amount was $680. RX 8 at 13-16. Complainant's gross pay for these periods was $2,680. *Id.*

The earnings statements reflect that ntax was last paid on February 23, 2005, for the pay period beginning January 22, 2005 and ending February 4, 2005. RX 8 at 16. No further ntax payments are shown after that time. *See* RX 8 at 17-24. The ntax amounts were not reported on Complainant's W-2 form, and no taxes were ever paid on them. TR at 60, 84.

Complainant testified that he believed the ntax payments were "part of his pay." TR at 61. He testified that he did not ask Kamal what the ntax was for (TR at 61), and did not understand why those amounts were not taxed. TR at 71. Complainant testified that the payments were described on his pay stubs as "ntax," not "per diem." TR at 62. He further testified that with the ntax amounts, his gross pay matched the amount that Respondent, through Mark, had agreed to pay him. TR at 81.

Complainant testified that he received per diem when he worked for Trinuke, and understood that it was to cover expenses like rent and meals. TR at 50. In contrast, he did not understand why Respondent would pay him per diem, as he was at all times a resident of Overland Park, Kansas, which is near the Sprint facility where he worked. TR at 84. Complainant thought per diem was paid to employees who travel or who are just starting out in a new project location. TR at 84.

Kamal testified that the ntax amounts were for a per diem allowance. TR at 92, 123. He explained that the per diem payments are non-taxable, and that per diem can only be paid for six months or for a short term project. TR at 92-4, 121-22. Kamal testified that per diem is paid as a "professional practice" to cover employees' lodging, travel and other needs, and that Respondent requires employees who receive per diem to submit expense sheets substantiating their expenses at the end of each year. TR at 93, 96, 123, 128. If an expense sheet is not received within 30

days of Respondent's request for one, Kamal testified that Respondent will stop the per diem payments. TR at 95-6.

Kamal did not recall why Complainant received per diem. TR at 93. He said that in most cases the employee requests per diem and he thought Complainant may have requested it, but could not remember. TR at 92-3. Kamal also believed that Complainant was living in Overland Park, Kansas before he started working for Respondent and was not traveling in his work for Sprint. TR at 94. Kamal denied that employees who receive per diem typically travel for work. TR at 129. He went on to explain that "most of them are traveling," but some employees change projects and move every three to six months, so Respondent pays them per diem. TR at 129.

Kamal did not believe that he received any expense sheets from Complainant for 2004, but may have had received some for 2005. TR at 123. He testified that the information received from Complainant for 2005 substantiated expenses of $680, so the per diem amount was reduced from $995 to $680 in early 2005. TR at 124. *See also* RX 8 at 13-16. Kamal also testified that Respondent stopped paying the per diem once it received Complainant's resignation. TR at 124. There is no evidence in the record establishing whether Complainant submitted an expense report to substantiate his receipt of the $995 ntax payments in 2004.

Kamal believed that at some point, Respondent stopped paying Complainant's per diem because Complainant failed to submit expense sheets after he was requested to do so. TR at 95. Kamal also testified that he did not believe Respondent had to continue paying Complainant's per diem after it received his notice of resignation on or about March 4, 2005. TR at 96, 124. This was why Complainant's paycheck issued on March 9, 2005 (for the pay period ending February 19, 2005) did not contain the ntax amount. TR at 96. Kamal emphasized that Respondent is not obligated to pay per diem but that it may be paid at Respondent's discretion as a convenience to the employee, and there is no reason to pay per diem to an employee who has resigned. TR at 96. Kamal reiterated that the last paychecks Respondent issued to Complainant were to compensate him for the total number of hours that he worked. TR at 96.

Complainant acknowledged that Kamal asked him in December 2004 or January 2005 to provide information about his rent and monthly incidentals such as meals and gas. TR at 81, 83. Complainant testified that the expense information he provided in response to Kamal's request tallied up to $680. TR at 83. He only provided this information for two months, and does not have copies of the information he sent. TR at 61. Complainant understood that the $680 was not going to be taxed as wages, and was not included on his W-2 form. TR at 83-4. Complainant testified that when Kamal asked him to provide expense details in January 2005, he realized that the ntax amounts were a per diem allowance. TR at 84. He further testified that Kamal told him that the ntax amounts were for per diem toward the end of his employment with Respondent. TR at 61.

c. Deductions for "Advnce"

On March 9, 2005, Complainant received his paycheck for the pay period beginning February 5, 2005 and ending February 18, 2005. RX 8 at 17. The corresponding earnings statement for the first time reflects a deduction from Complainant's wages in the amount of $1350, which was described as "Advnce." RX 8 at 17. A second earnings statement covering the same time period shows an identical deduction. RX 8 at 28. In addition, identical deductions are reflected in two distinct earnings statements covering the pay period ending March 4, 2005, with a pay date of March 23, 2005. RX 8 at 19, 20; TR at 85-6.

For the pay period beginning March 5, 2005 and ending March 18, 2005, Complainant has an earnings statement which shows that he received regular pay of $725 for 29 hours of work ($25/hr. x 29 hrs.). RX 8 at 21. A second earnings statement covering the same time period shows that he was paid $2000 for 80 hours of work ($25/hr. x 80 hrs.), and this second earnings statement reflects a deduction in the amount of $1100, marked "Advnce." RX 8 at 22.

For the pay period beginning March 19, 2005 and ending April 1, 2005, Complainant has an earnings statement showing that he received $750 for 30 hours of work. RX 8 at 23. A second earnings statement covering the same time period shows that he was paid $2000 for 80 hours of work. RX 8 at 24. No deductions were taken from these amounts, but both statements reflect year-to-date deductions for "Advnce" in the amount of $6500. RX 8 at 23 and 24.

d. Summary of Earnings

In sum, Respondent paid Complainant the pre-tax amounts listed on the schedule below, which are not in dispute as to the amounts or timing of the payments.

Pay Period Ending	Hours	Regular	ntax/per diem	Gross Pay	Deduction
July 9, 2004	80	$2000.00	$995.00	$2995.00	
July 23, 2004	80	2000.00	995.00	2995.00	
August 6, 2004	80	2000.00	995.00	2995.00	
August 20, 2004	80	2000.00	995.00	2995.00	
September 3, 2004	80	2000.00	995.00	2995.00	
September 17, 2004	80	2000.00	995.00	2995.00	
October 1, 2004	80	2000.00	995.00	2995.00	
October 15, 2004	80	2000.00	995.00	2995.00	
October 29, 2004	80	2000.00	995.00	2995.00	
November 12, 2004	80	2000.00	995.00	2995.00	
November 26, 2004	80	2000.00	995.00	2995.00	
December 10, 2004	80	2000.00	995.00	2995.00	
December 24, 2004	80	2000.00	680.00	2680.00	
January 7, 2005	80	2000.00	680.00	2680.00	
January 21, 2005	80	2000.00	680.00	2680.00	
February 4, 2005	80	2000.00	680.00	2680.00	
February 18, 2005	80	2000.00	--	2000.00	($1350.00)
February 18, 2005	80	2000.00	--	2000.00	(1350.00)

March 4, 2005	80	2000.00	--	2000.00	(1350.00)
March 4, 2005	80	2000.00	--	2000.00	(1350.00)
March 18, 2005	29	725.00	--	725.00	
March 18, 2005	80	2000.00	--	2000.00	(1100.00)
April 1, 2005	30	750.00	--	750.00	
April 1, 2005	80	2000.00	--	2000.00	
Totals	**1819**	**$45,475**	**$14,660**	**$60,859**	**($6,500)**

Overtime and Additional Payments

Complainant testified that he worked a total of 1797 hours, which includes 317 hours of overtime, although he acknowledged that there could be a discrepancy of one or two hours. TR at 66-7. *See also* CX 1 at 21. He further testified that he submitted to Respondent time sheets which support the numbers of hours he worked. TR at 65-6; RX 10 at 1-22. Complainant's position is that, pursuant to the hourly rates established in his alleged agreement with Mark, Respondent owes him back wages for regular hours and overtime worked.

Complainant testified that Respondent did not "demand" that he work overtime. TR at 63. He also acknowledged that there was no written agreement stating that Respondent would pay for overtime. TR at 64. Complainant indicated that he started documenting overtime hours the day he started working for Respondent. TR at 74.

Kamal testified that Complainant was a salaried employee who was exempt from overtime. TR at 119. He further testified that Respondent does not require exempt employees to work overtime. TR at 124. However, he added that Respondent's clients sometimes approve overtime hours. TR at 124. When this happens, Kamal explained that Respondent tries to pay the employee for the overtime hours once Respondent has been paid for the hours by the client. TR at 124. Kamal testified that Respondent pays overtime predicated on the employee's salary, at the same rate as regular pay. TR at 124.

Exemption notwithstanding, Respondent asserts that it has paid Complainant for all of the overtime to which he is entitled. Complainant's W-2 forms show reported gross earnings of $24,000 for 2004 and $21,475 for 2005, for total earnings of $45,475. TR at 67-8; RX 9. Respondent contends that when $45,475 is divided by Complainant's regular rate of pay, $25.00 an hour, it is apparent that Respondent paid Complainant for a total of 1819 hours. Respondent therefore contends that based on Complainant's own contention that he worked a total of 1797 hours, Respondent actually overpaid Complainant by 22 hours. *But see* TR at 99, 125 (Kamal's testimony that Complainant was overpaid by 28 hours). Kamal testified that his own mistake resulted in the overpayment, and Respondent has not made any effort to recoup it. TR at 125. Respondent thus contends that Complainant is not entitled to any back wages.

Complainant testified that he first inquired about pay for overtime in July 2004. TR at 74. He said that he called both Kamal and Mark, and was told that Respondent would pay him once he had accumulated 80 overtime hours. TR at 74. However, Complainant testified that he did not receive any overtime pay after he accumulated 80 overtime hours. TR at 74.

Complainant followed up with Mark, who told him that Respondent would pay all overtime due if Complainant were ever "benched" because there was no project for him. TR at 75. Complainant understood this to mean that Respondent would pay him for non-productive time with the hours it owed him for overtime. TR at 75-6. Complainant testified that he would have preferred to receive his overtime pay as it accumulated. TR at 76.

When asked if any representative of Respondent had agreed to pay him for overtime, Complainant testified that he believed Mark was a representative of Respondent. TR at 64. Complainant explained that he had contacted Mark about employment with Respondent and that Mark made the contract with Apollo. TR at 64. He further explained that his compensation agreement was made through Mark and Mark's e-mail address bears Respondent's name, so Complainant "strongly" believed Mark was a representative of Respondent. TR at 64-5. In his opening statement, Complainant asserted that he would not have worked overtime unless Respondent had agreed to pay him for it. TR at 27.

On November 1, 2004, Complainant sent an e-mail to Kamal which states: "I was wondering if you could pay me for the overtime in the next pay cheque ($3000 would be good), like we discussed in our previous conversation. I had to send some money to my family, hence this request. I hope its [*sic*] not too much trouble for you." RX 11 at 1.

On January 13, 2005, Complainant sent another e-mail to Kamal reminding him to send a check for the overtime Complainant had worked. RX 11 at 2. Complainant requested "about 3000 dollars, as I need to send that money home." *Id.*

On January 20, 2005, Complainant wrote the following e-mail to Kamal: "Please send me some money from my overtime pay as I need to send some money to India. I would appreciate it if you can pay me about 4000 USD. Just as information, I have about 293 hours of overtime and you sent me a cheque for 2500 USD earlier." CX 1 at 14; RX 11 at 3.

At trial, Kamal testified that he believes that he responded to Complainant's e-mail of January 20, 2005 by sending Complainant a check for $4000. TR at 133-34.

The record reflects that in addition to his regular paychecks, Respondent issued two other checks to Complainant. TR at 51-2; RX 6, 7. The first check, dated November 19, 2004, was for $2,500. RX 7. The second, dated February 1, 2005, was for $4,000. RX 6. Both checks contain the notation "Payroll Advance" in the lower left corner. TR at 51-2; RX 6, 7.

Complainant recalled that the checks had "Payroll Advance" on them, but denied that they were payroll advances. TR at 51-2, 74. He testified that he assumed that the checks were issued in response to his e-mail requests for overtime. TR at 51-2, 74. *See also* RX 11 at 1-3; CX 1 at 14. Complainant testified that he did not receive any reply to his e-mails denying his requests for overtime or indicating that the payments were payroll advances. TR at 40.

Complainant further testified that as far as he recalled neither the checks nor any attachments thereto showed any deductions for taxes. TR at 52. Complainant did not recall whether the amounts of the two checks were included in his W-2 form at year end. TR at 52.

Kamal testified that when an employee requests a payroll advance, Respondent's practice is to send a loan document for the employee to sign which asks him to state the amount that can be deducted from his future paychecks until the loan is repaid. TR at 107, 125. Kamal testified that he sent the loan document to Complainant, but Complainant never returned it. TR at 107. Later, when he was again asked if he sent the loan document to Complainant, Kamal testified that, "as a business practice, definitely we would have mailed that with the check [that] we sent as a payroll advance." TR at 125.

When asked whether the "payroll advance" checks for $2500 and $4000 were issued as a result of Complainant's e-mails requesting overtime pay, Kamal testified that he sent the checks based on Complainant's requests for $3000 or $4000. TR at 105. When asked if he agreed that Complainant had requested payment for overtime and not a payroll advance, Kamal responded by explaining Respondent's policy for payment of overtime. TR at 105. He said that Respondent bills its client 30 days after Respondent's employee performs services for the client, and the client normally pays the bill within 45 to 60 days. TR at 105. By the time the client pays for any overtime hours, 90 days have elapsed. TR at 105. Kamal also said that the client sometimes questions or disputes the time sheets supporting the overtime claimed by Respondent's employee, which may further delay overtime payment by the client to Respondent. TR at 105-6. Kamal explained that as for overtime pay, "whenever we get paid, we are going to pay you." TR at 105. He further explained that since Complainant indicated that he needed to send money to India for his sister's marriage, "as a humanitarian advance we wanted to help you. We paid you as a payroll advance." TR at 106. He also said that at the end of Complainant's employment, Respondent paid him for "each and every hour" worked. TR at 106.

On further questioning, Kamal agreed that Complainant had requested payment for overtime but insisted that Complainant could not have been paid for overtime because Respondent had not yet been paid. Accordingly, Kamal said he gave Complainant the pay advance which he requested. TR at 106. Kamal admitted that he does not have any written request by Complainant for a payroll advance, but he added that "it was clearly mentioned in the memo that the check I sent you was a payroll advance. If you're not interested in the payroll advance, you could not have deposited it and sent it back." TR at 106.

Kamal testified that no taxes were taken from the $6500 which Respondent advanced to Complainant. TR at 126-27. Kamal further testified that Respondent eventually recovered $6500 from Complainant's wages, and that the deductions for the advance were clearly shown on Complainant's pay stubs. TR at 127. Kamal confirmed that the two checks marked payroll advance were generated on the dates shown on the checks. TR at 127.

On April 6, 2005, Complainant e-mailed Kamal with an accounting of the hours he worked between June 28, 2004 and March 11, 2005. CX 1 at 21. The accounting reflects that Complainant worked a total of 1797 hours, which includes 317 hours of overtime. CX 1 at 21. Complainant reminded Kamal that pursuant to his agreement with Mark, the "rate before 12/15/2004 (78% of [$]48[/hr.] = [$]37.40) is different from the rate after my H-1 started (70% - 33.60$) [*sic*]." CX 1 at 21. Complainant acknowledged that April 6, 2005 was the first time he

provided written notice to Respondent contesting his pay rate. TR at 69. Complainant testified that he never received any response from Kamal denying his claim or calculations. TR at 35.

Kamal testified that he remembered Complainant's April 6, 2005 e-mail. TR at 108. He did not recall if he replied to the e-mail but believed he told Complainant that Respondent had paid him for all of the hours he had worked. TR at 109. Kamal does not remember if he has an e-mail or other writing stating that Complainant's calculations were not correct. TR at 109.

On April 27, 2005, Complainant e-mailed Kamal and Mark asserting that Respondent still owed him about $4500. CX 1 at 23. That same day, Complainant sent a second e-mail to Kamal and Mark detailing how he arrived at the amount he believed Respondent owed him. CX 1 at 24-5. First, Complainant asserted that he was owed $4015 due to reduced amounts he received for the pay periods February 5 through February 18, 2005, February 19 through March 4, 2005, and March 5 through March 11, 2005. CX 1 at 25. Second, Complainant asserted that he was entitled to 252 hours of overtime pay for work performed from June 28, 2004 through December 11, 2004 under his student visa. He claimed a rate of pay of 78% of $48.00 an hour, or $37.44 an hour, which he multiplied by 252 hours to arrive at pre-tax total wages due of $9434.88. CX 1 at 25. Thirdly, Complainant asserted that he was entitled to 59 hours of overtime for work performed from December 14, 2004 through March 11, 2005, after his H1-B became effective. He claimed a rate of pay of 70% of $48.00 an hour, or $33.60 an hour, which he multiplied by 59 hours to arrive at pre-tax wages due of $1982.40. CX 1 at 25.

Kamal did not clearly remember reading or replying to Complainant's April 27, 2005. TR at 109. When asked if he had written proof that he denied Complainant's calculations, Kamal testified that he spoke to Complainant about it because Respondent had already processed and finished his payroll. TR at 109-10.

Kamal testified that Apollo paid Respondent for all of the work performed by Complainant, including overtime.[6] TR at 92, 130-31. He reiterated that Respondent paid Complainant for all of the hours he worked, and for all of the hours for which Respondent was paid by Apollo. TR at 131. Kamal agreed that the hourly rate is at issue. TR at 131.

Complainant's Resignation

On February 28, 2005, Complainant sent an e-mail to Kamal and Mark advising that he was resigning from his job with Respondent. CX 1 at 15. Complainant continued to work and submitted time sheets to Respondent through March 11, 2005. TR at 65; RX 8.

Complainant testified that Respondent penalized him for resigning. TR at 62. Complainant testified that he e-mailed Kamal with the total number of hours he had worked and how much pay he believed Respondent owed him. TR at 62; CX 1 at 14, 21, 24-5. Complainant testified that after he notified Kamal that he was resigning, Kamal told him that Respondent

[6] Kamal testified that Apollo paid for all of Complainant's hours with the exception of "one hour or something, which we had a dispute with them." TR at 92.

would not honor the agreement to pay Complainant a percentage of what Apollo paid Respondent as a penalty for his leaving the company. TR at 62-3.

The Administrator's Findings

Following an investigation conducted by Wage and Hour Investigator Tyrone Thrope, the DOL's Wage and Hour Administrator issued a February 23, 2006 determination that Respondent had not violated the H-1B visa provisions of the INA. Respondent submitted the Administrator's determination letter accompanied by Mr. Thorpe's report. RX 5.

In his report, Mr. Thorpe noted that Complainant was hired under an LCA which identified Durham, North Carolina as the pertinent work location, but Complainant actually worked at the Sprint site in Overland Park, Kansas. RX 5 at 5. He determined that although Complainant worked in Kansas, he was paid more than Kansas City's prevailing wage of $41,536 or Durham's prevailing wage of $41,538. *Id*. Mr. Thorpe found that Respondent employed Complainant at a salary of $2000 bi-weekly or $52,000 annually. *Id*. Ultimately, Mr. Thorpe concluded that Respondent had not violated the regulation at 20 C.F.R. § 655.731 since it paid Complainant "more than the required wage." RX 5 at 6.

Mr. Thorpe concluded that Complainant was exempt under Fair Labor Standards Act regulation 541.300.[7] RX 5 at 5 (citing 20 C.F.R. § 655.737(d)). Mr. Thorpe also referred to "the overtime exemption that pertains to the H-1B worker who has attained a master's or higher degree in a specialty related to the position of employment." RX 5 at 7. He noted that Respondent had not paid any overtime to similar exempt employees, and that the LCA did not address overtime obligations. RX 5 at 5, 7.

Mr. Thorpe recorded Complainant's statement that he received two payments of overtime compensation that totaled $6500, and that Respondent began deductions toward the recovery of "the paid overtime" once Complainant terminated his employment. RX 5 at 4. Mr. Thorpe noted that Respondent's pay records show that the $6500 was "an advancement," and there were no payroll entries showing that the pay was for overtime. RX 5 at 4-5. Mr. Thorpe found that the $6500 received by Complainant did not relate mathematically to any overtime based on the hours that Complainant had previously worked. RX 5 at 5.

With regard to LCA notice requirements, Mr. Thorpe noted that Complainant's H-1B visa was "completed" on December 14, 2005, but Respondent did not provide Complainant with a copy until February 2005. Mr. Thorpe found that although a copy of the LCA was not provided to Complainant at the time he reported to his permanent place of work, Mr. Thorpe determined that this was a "minor technicality." RX 5 at 5.

[7] 29 C.F.R. § 541.300 provides: "The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions, such as acting or music. Since the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both groups."

In addition, although Complainant did not have a hard copy of the LCA, Mr. Thorpe found that the LCA had been posted electronically at the place of employment and Complainant had access to the posting. RX 5 at 5. He noted that Complainant substantiated the electronic posting. RX 5 at 5 (citing 20 C.F.R. § 655.734(B)). Mr. Thorpe therefore concluded that there was no violation of the LCA notice requirements found at 20 C.F.R. § 655.734, since Respondent had posted the LCA electronically. RX 5 at 6.

Deposition Testimony of Tyrone Thorpe

Respondent also submits the deposition testimony of Wage and Hour Investigator Tyrone Thorpe, who Mr. Thorpe conducted the investigation of Complainant's complaint that Respondent had violated provisions of the H-1B non-immigrant worker program. [8] RX 17 at 9.

Mr. Thorpe testified that he examined the files of approximately 25 Respondent employees with job descriptions similar to Complainant's. RX 17 at 9-10. He denied that any of those files showed that the employees were paid overtime. *Id.* at 10. Mr. Thorpe testified that he had no facts to support that Complainant was supposed to be paid overtime. *Id*. at 11.

Mr. Thorpe testified that the Fair Labor Standards Act is the relevant statute which requires employers to pay certain employees overtime for hours worked over forty. RX 17 at 23. He further testified that he found evidence that Complainant was exempt from overtime under the Fair Labor Standards Act as a "professional worker." *Id.* at 9, 23. *See* 29 C.F.R. § 541.300.

Mr. Thorpe testified that Complainant's salary was $52,000 per year. RX 17 at 11, 12-3. He said that there was no "pay rate," but a salary of $2000 bi-weekly or $1000 weekly. *Id.* at 17. Mr. Thorpe did not inquire as to why Complainant received gross pay of $2995 for some periods. *Id.* at 17-8. Mr. Thorpe testified that Complainant worked near Kansas City, Kansas, where the prevailing wage during 2004-2005 was $41,538. *Id*. at 15.

Mr. Thorpe testified that the "ntax" which appears on Complainant's earnings statements was "tax on the . . . salary that was paid to him." RX 17 at 12. He further testified that there was no mention of per diem during his investigation. *Id*. at 14.

Mr. Thorpe did not find any evidence of overtime being paid to Complainant, or any evidence of an agreement for paying Complainant overtime. RX 17 at 13, 16. Mr. Thorpe did not have the total hours that Complainant worked in 2004 and 2005. *Id*. at 13. He testified that Complainant was paid for all of the hours that he put on his time sheets. *Id*. at 14.

Mr. Thorpe recalled that Complainant received two checks totaling $6500 which have the notation "Payroll Advance" in the memo area. RX 17 at 14-5, 19. Mr. Thorpe did not find any correlation between the checks and the overtime claimed by Complainant. *Id*. at 15. Mr. Thorpe did not know and would not agree that Complainant had requested payment of certain amounts

[8] Mr. Thorpe started working for the U.S. Department of Labor in January 1996. RX 17 at 6. He testified that he has handled 350 or more wage and hour investigations. Id. at 7.

for overtime, not for payroll advance. *Id*. at 22. Mr. Thorpe did not find any irregularities in the payments made by Respondent to Complainant during 2004 or 2005. *Id.* at 16.

CREDIBILITY ANALYSIS

1. Complainant

Generally, I find that Complainant's testimony was credible and internally consistent although I note that at the Wage and Hour investigation there was no mention of Complainant having received per diem payments from Respondent.

Specifically, I find that Complainant sincerely believed that: he had a wage agreement with Mark, Kamal's uncle, as a representative of Respondent; he did not realize that the ntax payments were for per diem until December 2004 or January 2005; he was entitled to and received wages for overtime pay; and the two checks totaling $6500 were issued in response to his requests for overtime pay and not as loans or payroll advances. After observing the two witnesses at the hearing, I find credible Complainant's testimony that after he alerted Respondent in late February 2005 that he was resigning, Kamal told Complainant that Respondent would not honor the agreement to pay Complainant a percentage of what Apollo paid Respondent as a penalty for his leaving the company. TR at 62-3.

Complainant's demeanor and earnest testimony was far more believable than that of Respondent's witness, Kamal Rao, as Complainant testified convincingly that he was paid $25.00 per hour regular wages, overtime at the same $25.00 per hour rate, and $680 per pay period as a negotiated added wage with Respondent representative Mark Rao Mahender, Kamal's uncle. TR at 32-3, 53-54, 88, 130; CX 1 at 1,2 6-8, 15. I find that Complainant's characterization that the $6500 total payments from Respondent were for his overtime hours was credible since the payments came in direct response to Complainant's requests for overtime pay. Kamal testified that Complainant's pay is dependent on the contracting company, Apollo in this case, and that Apollo paid Respondent for overtime worked by Complainant. TR at 91-2, 130-31. I find that the payments totaling $6500 were overtime pay and not pay advances or loans as they were not documented in accordance with what Kamal testified was Respondent's usual custom and practice. *See* TR at 125. Not until Complainant announced his resignation in February 2005 did Respondent stop paying Complainant his added wage and first characterize the overtime payments as advances or a loan for $6500.

I further find that Complainant and Mark agreed to characterize Complainant's added wages as per diem rather than a higher hourly rate because of the favorable tax consequences to Complainant having it this way.[9] The fact that Complainant did not recall that the $680 payments per pay period were actually accounted for as per diem payments until some time in 2005 is understandable given Complainant's status as a *pro se* party. This is disregarded as immaterial as Complainant was likely not eligible for per diem payments as he resided in Kansas

[9] Apparently, this is not uncommon as many non-immigrant workers prefer to receive a portion of their wages in the form of a per diem in order to avoid paying taxes. *See Administrator, Wage and Hour Division v. Geysers Internt'l, Inc.,* 2006-LCA-5 (ALJ Dec. 11, 2006), p.3, fn 2.

during his work with Respondent and never lived in North Carolina or Iowa. *See* TR at 93-94. Because I find that Complainant chose to receive per diem payments in lieu of additional taxable wages, Complainant cannot recover any missed per diem payments after February 4, 2005.

2. Kamal Rao

I find Kamal's testimony to be credible with respect to his explanations of Complainant's salary being dependent on what Apollo paid to Respondent for Complainant's work ($48/hour) and Respondent's payroll system and its policies on payment of per diem and overtime.

However, as referenced above, I find that Kamal's credibility was undermined by his testimony on the subject of the alleged "Payroll Advances" of $2500 and $4000 which Respondent made to Complainant. Kamal testified that when an employee requests a payroll advance, Respondent sends a loan document for the employee to sign which asks him to state the amount that can be deducted from future paychecks until the loan is repaid. TR at 107, 125. Although Kamal claims to have mailed the loan document to Complainant, it is undisputed that Complainant never signed or returned any such document. Later, Kamal was again asked if he sent the loan document to Complainant and he testified that "as a business practice, definitely we would have mailed that with the check [that] we sent as a payroll advance." TR at 125. I find that Kamal's testimony about whether he actually mailed the loan document to Complainant was inconsistent and somewhat evasive. Finally, I find that the timing of events further impeaches Kamal's credibility. It is apparent from the record that Complainant's resignation caused Kamal to re-characterize the overtime payment as a loan as Respondent took no action to collect on the alleged debt until March 9, 2005, which is the date of the first paycheck issued to Complainant *after* he informed Kamal on February 28, 2005 that he was resigning his position with Respondent. *See* RX 8 at 17.

Kamal's testimony was also implausible as he attempted to downplay and dismiss his uncle Mark's involvement in setting up Complainant's pay structure and promising that Complainant would be paid for his overtime work at the rate of $25.00 per hour. *See* TR at 32-3, 53-54; CX 1 at 1, 2, 6-8, 15. Also, Kamal's credibility was further undermined when he testified that Complainant's per diem payments were stopped because he announced his resignation, as this was inconsistent with his earlier testimony that the per diem payments stopped because Complainant failed to submit expense sheets to substantiate the per diem amount. TR at 95, 124.

3. Tyrone Thorpe

Mr. Thorpe testified by telephonic deposition conducted on June 13, 2006. RX 17. While I find no reason to question Mr. Thorpe's general credibility, I note that his testimony made his recollections of his investigation of this matter appear vague and/or inaccurate. For example, Mr. Thorpe testified, apparently in confusion, that the "ntax" which appears on Complainant's earnings statements was "tax on the . . . salary that was paid to him." RX 17. There is also no discussion about monies paid to Complainant by Respondent for per diem. For the most part, however, Mr. Thorpe's testimony was consistent with the findings contained in the written report of his investigation, and was therefore credible.

DISCUSSION

1. To what salary was Complainant entitled during his employment with Respondent?

a. Establishing the Wage Requirement

As previously stated, an employer seeking to employ H-1B non-immigrant workers must attest in an LCA that they will pay the workers a required wage rate. 8 U.S.C. § 1182(n)(1)(A). Specifically, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question ("actual wage"); or (2) the prevailing wage level for the occupational classification in the area of employment ("prevailing wage"). 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.731. Accordingly, as the employer of an H-1B non-immigrant, Respondent was required to pay Complainant at or above the wage rate specified in the LCA. *See Mao v. George Nasser, d/b/a Nasser Engineering & Computing Services*, 2005-LCA-36, at 20 (ALJ May 26, 2006).

Complainant's primary argument is that Respondent agreed through Mark to pay him $37.44 an hour for as long as he worked under a student visa, and $33.60 an hour once his H-1B visa became effective on December 15, 2004. *See* TR at 26-7 (Complainant's opening statement); TR at 40, 53-4. Respondent counters that Complainant's salary was $2000 bi-weekly, which equates to $25.00 an hour or $52,000 a year. Respondent denies that any employee or representative of Respondent ever agreed to pay Complainant more than $52,000 annually. TR at 120-2; ALJX 2 at 10.

b. Alleged Oral Agreement Does Not Establish Wage Rate

Complainant contends that Respondent owes him wages for a total of 1797 hours, including overtime, based on a wage agreement he allegedly made with Mark. As previously noted, Complainant testified that Mark agreed on Respondent's behalf to pay Complainant 78% of $48 an hour, or $37.44 an hour, for as long as he worked under a student visa. TR at 33. Complainant points out that $37.44 an hour, multiplied by 80 hours, yields $2995.20. TR at 33. In support of the existence of the alleged agreement, Complainant asserts that $2995.20 is close to the $2995 in gross pay he received on a bi-weekly basis from June 28, 2004 through the pay period ending December 10, 2004. TR at 33; RX 8 at 1-12.

Complainant further testified that under his agreement with Mark, Respondent was obligated to pay Complainant 70% of $48 an hour, or $33.60 an hour, once his H-1B visa became effective on December 15, 2004.[10] *See* TR at 26-7 (Complainant's opening statement);

[10] For purposes of adjudication, I need not consider the time Complainant was employed by Respondent prior to December 14, 2004. *See Arramreddy v. IK Solutions, Inc*., 2006-LCA-20 (ALJ Nov. 15, 2006). This is because Respondent is not required to pay Complainant the required wages listed on the LCA for work done prior to Complainant attaining H-1B status. *See* 20 C.F.R. § 655.731. Complainant obtained H-1B status on December 14, 2004. *See* CX 3 at 5, 9. Prior to receiving the H-1B visa, Complainant was on an F-1 student visa and working with Respondent through Optional Practical Training following the completion of his Master's degree. *See* TR at 26 (Complainant's opening statement); ALJX 1 at 1. In the interest of completeness and to show Respondent's pattern

TR at 40, 53-4. Complainant points out that $33.60 an hour, multiplied by 80 hours, yields $2688. Complainant asserts that he received $2680 in gross pay from December 11, 2004 through the pay period ending February 4, 2005, which he says concurs with his claim that he was promised $33.60 an hour.[11] TR at 40.

Absent evidence of an amendment to the LCA, the provisions of the LCA establish the standard against which to measure any deficiency in legally required pay to a non-immigrant with H-1B status. When an LCA states a wage amount lower than that prescribed by correspondence of record between the employer and the prosecuting party, particularly if the higher amount was never paid to the prosecuting party, DOL would not enforce the private contractual agreement because DOL's enforcement power derives from the INA and applicable regulations, and thus is limited to the terms of the LCA. *See Mao v. George Nasser, d/b/a Nasser Engineering & Computing Services*, 2005-LCA-36, at 21 (ALJ May 26, 2006) (citing *Rajan v. Int'l Business Solutions, Ltd.*, 2003-LCA-12 (ALJ April 30, 2003), aff'd in part, modified in part by *Rajan v. Int'l Business Solutions, Ltd.*, ARB No. 03-104 (ARB Aug. 31, 2004)). In accordance with these principles, I decline to give effect to any private oral agreement Complainant may have had with Mark regarding his hourly wage. Rather, in determining whether Respondent paid wages as required by 20 C.F.R. § 655.731, I will look to the LCA and to the wages which were actually received by Complainant.

c. Complainant's Actual Earnings Exceed the Wage Rate Specified in the LCA

In this case, the LCA provided that Respondent would pay Complainant the wage rate of $41,536 per year. CX 3 at 7. The LCA identified the pertinent work location as Dubuque, Iowa, where the prevailing wage for Computer Systems Analysts was $31,366 in 2004.[12] CX 3 at 7. In addition, the LCA indicates a potential subsequent work location of Durham, North Carolina, where the prevailing wage was $43,722 in 2004. CX 3 at 8. *See* RX 14, 15.

It is undisputed that Complainant never worked at either Dubuque, Iowa or Durham, North Carolina. Rather, the parties stipulated that the work Complainant performed while employed by Respondent occurred in Lahaska, Kansas, at Sprint. TR at 20. At trial, Respondent submitted evidence that the prevailing annual wage for a Computer Systems Analyst in Kansas City, Kansas was $41,538 in 2004 and $45,760 in 2005. RX 12, 13.

It is apparently also undisputed that Complainant's actual pay was not based on any of the annual salaries specified in the LCA. Rather, he received earnings, described on his pay stub as "Regular," in the amount of $2000 for 80 hours of work on a bi-weekly basis from June 28, 2004 through the pay period ending March 4, 2005, and at other times thereafter. *See* RX 8 at 1-24; TR at 60. This amounts to $25.00 per hour, or $52,000 a year. TR at 67.

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of paying per diem expenses on top of wages, the full term of Complainant's employment is considered for purposes of determining whether Respondent paid the required wages.

[11] Complainant does not explain why his hourly rate *decreased* after he obtained his H-1B visa despite his actual work not changing when the H-1B visa is arguably more valuable to an employee than the student work visa as it lasts for up to 6 years.

[12] *See* footnote 4, supra.

The regulations define "actual wage" as "the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." *See* 20 C.F.R. §§ 655.731(a)(1), 655.715. Where no other employees are shown to have similar experience and qualifications, "the actual wage shall be the wage paid to the H-1B non-immigrant by the employer." *Id. See also Administrator, Wage and Hour Division v. Novinvest, LLC*, 2002-LCA-24, at 13 (ALJ Jan. 21, 2003).

Here, Kamal credibly testified that Respondent pays employees with skills and qualifications similar to those of Complainant an annual salary of $52,000. TR at 121. Kamal testified that Respondent paid Complainant a salary of $2000 bi-weekly, or $52,000 per year. TR at 120-2. Kamal acknowledged that this is higher than the wage rate of $41,538 per year which is identified in the LCA, and explained that Respondent determined that it would pay Complainant $52,000 per year based on his qualifications and the project on which he was working. TR at 120-21, 122.

I find that $52,000 a year is properly deemed Complainant's actual wage, rather than the wage rate specified in the LCA. I further find that the actual wage Respondent paid to Complainant was higher than the prevailing wage in the Kansas City area, where Complainant was employed. Accordingly, I find that the required wage is the actual wage of $52,000 a year. *See U.S. Dept. of Labor v. Quikcat.com, Inc.*, 2003-LCA-19 (ALJ June 9, 2005).

e. The Required Wage Does Not Include "Ntax"

In addition to the $2000 he earned bi-weekly, Complainant's earnings statements also reflect payments described as "ntax." RX 8; TR at 60. The ntax amount was $995 also paid bi-weekly from June 28, 2004 through the pay period ending December 10, 2004. RX 8 at 1-12. Accordingly, Complainant's gross pay for these periods was $2,995. Beginning on December 11, 2004 and continuing through the pay period ending February 4, 2005, the ntax amount was $680. RX 8 at 13-16. Complainant's gross pay during for these periods was $2,680. As of the pay period beginning February 5, 2005, the earnings statements do not reflect any further ntax payments. *See* RX 17-24. The ntax amounts, however, were not reported on Complainant's W-2 form and no taxes were paid on them. TR at 60.

Complainant testified that he believed the ntax amounts were "part of his pay" because with the ntax amount, his gross pay matched the amount Respondent, through Mark, had agreed to pay him. TR at 61, 81. In addition, Complainant testified that the payments were described on his pay stubs as "ntax," not as "per diem." TR at 62. Kamal testified that the ntax amounts represented a per diem allowance. TR at 92.

I find that the weight of the evidence establishes that the "ntax" payments were for per diem allowance. Although Complainant testified that in the beginning of his employment with Respondent he did not understand that the ntax was for per diem or why those amounts were not taxed (TR at 71), he later testified that he realized that ntax represented a per diem allowance when he was asked to provide expense details in January 2005. TR at 83-4. He further testified that Kamal told him that the ntax was a per diem toward the end of his employment with

Respondent. TR at 61. When asked if he came to understand what the ntax was for, Complainant testified, "It was per diem." TR at 71. Accordingly, Complainant apparently does not now dispute that the ntax payments were in fact for per diem.

Complainant acknowledged that Kamal asked him in December 2004 or January 2005 to provide information about his rent and monthly incidentals such as meals and gas. TR at 81, 83. Complainant testified that the expense information he provided in response to Kamal's request tallied up to $680. TR at 83. This corresponds with the reduction of the amount of ntax from $995 to $680 beginning on the pay date January 12, 2005 (covering the pay period beginning December 11 and ending December 24, 2004). RX 8 at 13. It also supports Kamal's testimony that the ntax was for per diem, since Respondent required employees receiving per diem to submit expense sheets substantiating their expenses at the end of each year. TR at 93, 96, 123, 128. Accordingly, I find that the ntax amounts reflected on Complainant's earnings statements were for per diem allowance.

I further find that the per diem payments are not relevant to Respondent's obligation to pay Complainant the required wage. Payments to H-1B workers do not qualify as "wages paid" for purposes of satisfying the employer's required wage obligation unless they are:

> (ii) payments reported to the Internal Revenue Service ["IRS"] as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS . . .
>
> (iv) payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments . . . ."

20 C.F.R. §§ 655.731 (c)(2)(ii) and (iv). See also *Administrator, Wage and Hour Division v. Synergy Systems, Inc.,* ARB No. 04-076, 2003-LCA-22, at 10 (ARB June 30, 2006). Here, the per diem payments do not qualify as "wages paid" because the record contains no evidence that Respondent reported these sums to the IRS. In addition, I find that the ntax amounts were non-taxable per diem and not wages paid because Complainant testified that his per diem expenses tallied up to $680 per month, the same amount he received for per diem. TR at 83-4.

In *Administrator, Wage and Hour Division v. Geysers International, Inc*., 2006-LCA-5 (ALJ Dec. 11, 2006), the administrative law judge recognized that the Administrator has in some cases permitted conversion of per diem to reach prevailing wages. This is permitted only where both wages and per diem were paid during the same pay period, and where the employer has paid all of the appropriate taxes on the per diem amounts. *See id.* at 7-8 (citing 20 C.F.R. § 655.731 (c)(2)(ii) and (iii)). There is no allegation or evidence that this type of situation is presented in this case. *Geysers International* demonstrates that absent specific circumstances, the wages required pursuant to 20 C.F.R. § 655.731 are separate and distinct from per diem payments. Accordingly, Respondent's payment of per diem to Complainant does not alter my conclusion that the required wage is $52,000 a year.

f. Employment Agreement Does Not Establish Wage Rate

In June 2004 or sometime thereafter, Complainant received from Respondent a seven-page document entitled "Employment Agreement." TR at 52-3, 55; RX 3. Kamal testified that he recognized the Employment Agreement, including the eighth page of the agreement entitled "Addendum A," as the agreement he sent to Complainant. TR at 117. Addendum A provides that Complainant's compensation is $21.63 per hour. RX 3 at 8; TR at 39-40. Although Complainant testified that he read the first seven pages of the Employment Agreement, it is not clear from the record when he received Addendum A. *See* TR at 52-7.

Complainant testified that he had reviewed Addendum A by the time of trial and that the stated compensation rate of $21.63 was not acceptable to him. TR at 55-6. Kamal testified that Complainant's salary was $52,000.00 per year, and that he received payments of $2000.00 on a bi-weekly basis. TR at 120, 122. Broken down to an hourly rate, this amounts to $25.00 per hour, not $21.63 an hour. *See* TR at 67.

Neither Respondent nor Complainant contends that Complainant was entitled to the wage of $21.63 an hour as provided in Addendum A to the Employment Agreement. In addition, the record reflects that Complainant never signed or returned the seven-page Employment Agreement or Addendum A. TR at 55-6, 58. In light of these circumstances, I do not give any weight to the hourly wage of $21.63 specified in the Employment Agreement.

g. Conclusion as to Required Wage

In sum, I find that neither Complainant's alleged oral wage agreement nor the wage rate specified in the "Employment Agreement" establish the wage at which Respondent was required to compensate Complainant.

Review of the earnings statements issued to Complainant during his employment with Respondent show two entries under the heading "Hours and Earnings." The first entry is described as "Regular," which corresponds with 80 hours of work and bi-weekly earnings of $2000. The second entry is described as "ntax." I found that ntax identified a non-taxable per diem allowance that does not qualify as "wages paid" for purposes of satisfying the employer's required wage obligation. In contrast, the $2000 bi-weekly payments exceed the wage rate specified in the LCA, were consistent on most of Complainant's earnings statements, and were duly reported to the IRS. Accordingly, I find that the evidence establishes that Complainant was employed by Respondent at a salary of $2000 bi-weekly, or $52,000 annually. This is Complainant's "actual wage," and the wage which Respondent was required to pay him.

2. Was Complainant entitled to overtime pay?

Complainant testified that Respondent did not "demand" that he work overtime. TR at 63. He also acknowledged that there was no written agreement stating that Respondent would pay Complainant for his overtime work. TR at 64. Complainant indicated that he started documenting overtime hours the day he started working for Respondent. TR at 74. Complainant

testified that he worked a total of 1797 hours, which includes 317 hours of overtime, although he acknowledged that there could be a discrepancy of one or two hours. TR at 66-7. *See also* CX 1 at 21. He further testified that he submitted to Respondent time sheets which support the number of hours he worked, including overtime hours. TR at 65-6; RX 10 at 1-22.

Respondent contends that Complainant's position as a Computer Programmer Analyst was exempt from overtime and that payment of overtime was not required by federal law. ALJX 2 at 2, 4. Respondent submits the deposition testimony of Wage and Hour Investigator Tyrone Thorpe that Complainant's position was exempt. RX 17 at 9, 23; ALJX 2 at 3-4. Respondent asks me to "confirm the position of Computer Systems Analysts [*sic*] held by [Complainant] at [Respondent] was exempt from overtime pay and that payment of overtime was not required by Federal Law." ALJX 2 at 4.

Kamal testified that Complainant was a salaried employee who was exempt from overtime. TR at 119. He further testified that Respondent does not require exempt employees to work overtime. TR at 124. Kamal added that Respondent's clients sometimes approve overtime and when this happens, Respondent tries to pay the employee for the overtime hours once Respondent has been paid by the client. TR at 124. Kamal testified that Respondent pays overtime predicated on the employee's regular pay. TR at 124.

Complainant's W-2 forms show reported gross earnings of $24,000 for 2004, and $21,475 for 2005, for a total of $45,475. TR at 67-8; RX 9. Respondent contends that when $45,475 is divided by Complainant's regular pay rate of $25.00 an hour, it is apparent that Respondent paid Complainant for a total of 1819 hours. Respondent therefore contends that based on Complainant's own contention that he worked 1797 hours including 317 hours overtime, Complainant was overpaid by 22 hours. *But see* TR at 99, 125 (Kamal's testimony that Complainant was overpaid by 28 hours). Kamal testified that Respondent has not made any effort to recoup the overpayment. TR at 125. Respondent thus contends that Complainant is not entitled to any back wages.

Consistent with the foregoing, I find that Respondent paid Complainant for all of the 1797 hours he documented, including overtime hours, at the rate of $25.00 an hour which was predicated on Complainant's regular salary of $52,000. Accordingly, I find that Complainant is not entitled to any back wages for unpaid overtime. The presence or absence of an exemption does not change this result and accordingly, I need not decide whether Complainant's position was exempt from overtime pay or whether payment of overtime was or was not required by federal law. *See* ALJX 2 at 4.

3. What is the effect of Respondent's deduction of $6500 from Complainant's wages to recoup alleged pay advances?

The record reflects that in addition to his regular paychecks, Respondent issued two other checks to Complainant. TR at 51-2; RX 6, 7. The first check, dated November 19, 2004, was for $2,500. RX 7. The second, dated February 1, 2005, was for $4,000. RX 6. Both checks contain the notation "Payroll Advance" in the lower left corner. TR at 51-2; RX 6, 7.

Complainant recalled that the checks had "Payroll Advance" on them, but he denied that they were payroll advances. TR at 51-2, 74. He testified that he assumed that the checks were issued in response to his e-mail requests for overtime. TR at 51-2, 74. *See also* RX 11 at 1-3; CX 1 at 14. Complainant testified that he did not receive any reply to his e-mails denying his requests for overtime or indicating that the payments were payroll advances. TR at 40.

Kamal admitted that he does not have any written request by Complainant for a payroll advance, but he added that "it was clearly mentioned in the memo that the check I sent you was a payroll advance. If you're not interested in the payroll advance, you could not have deposited it and sent it back." TR at 106. Kamal testified that when an employee requests a payroll advance, Respondent sends a loan document for the employee to sign asking him to state the amount which can be deducted from future paychecks to repay the loan. TR at 107, 125. Kamal testified that he sent the loan document to Complainant, but Complainant never returned it. TR at 107.

Kamal testified that no taxes were taken from the $6500 which Respondent allegedly advanced to Complainant. TR at 126-27. Similarly, Complainant testified that neither the checks nor any attachments thereto showed any deductions taken for taxes. TR at 52. Review of Complainant's earnings reveals that the amounts of the two "Payroll Advance" checks were not included in Complainant's W-2 form. *See* RX 8 at 1-24 and RX 9 at 1-2. Consequently, I find that the checks labeled "Payroll Advance" do not qualify as "wages paid" because the record contains no evidence that Respondent reported them to the IRS. *See* 20 C.F.R. § 655.731(c)(2)(ii). *See also Administrator, Wage and Hour Division v Synergy Systems, Inc.,* ARB No. 04-076, 2003-LCA-22, at 10-11 (ARB June 30, 2006).

Kamal testified that Respondent eventually recovered $6500 from Complainant's wages, and that the deductions for the advance were clearly shown on Complainant's pay stubs. TR at 127. The record reflects that Respondent deducted various amounts from Complainant's wages for the pay periods ending February 18, March 4, and March 18, 2005, under the description "Advnce." *See e.g.* RX 8 at 17. I find that the deductions for "Advnce" were taken by Respondent to recover the overtime payroll advance made to Complainant.

The regulations provide that "[t]he required wage must be paid to the employee, cash in hand, free and clear, when due, *except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage*." 20 C.F.R. §§ 655.731(c)(1), 655.731(c)(9) (emphasis added). Deductions which reduce the cash wage below the level of the required wage are authorized only when made in compliance with all of the requirements set forth in 20 C.F.R. § 655.731(c)(9)(iii). In addition, where the employer makes deductions for repayment of a loan or wage advance made to the employee, the DOL, in the event of an investigation, will require the employer to establish the legitimacy of purposes of the loan with reference to the standards set out in 20 C.F.R. § 655.731(c)(9)(iii). *See* 20 C.F.R. § 655.731(c)(13). That section requires, *inter alia*, that any deduction be made in accordance with a voluntary, written authorization by the employee. 20 C.F.R. § 655.731(c)(9)(iii)(A).

In this case, Respondent failed to produce any proof that Complainant voluntarily authorized any deductions in writing in accordance with section 655.731(c)(9)(iii)(A). Indeed, Kamal testified that Complainant never signed or returned the loan document which Kamal

claims to have mailed to him. Consequently, I find that Respondent's unauthorized deductions from Complainant's wages were not in accordance with the regulations governing the H-1B non-immigrant worker program and result in a back wage assessment. *See 20 C.F.R. section 655.731(c)(11); Administrator, Wage and Hour Division v. Geysers International, Inc*., 2006-LCA-5, at 9 (ALJ Dec. 11, 2006)

For the pay period beginning February 5, 2005 and ending February 18, 2005, Complainant's earnings statement reflects a deduction of $1350 for "Advnce." A second statement covering the same time period shows an identical deduction. RX 8 at 28. In addition, identical deductions are reflected in two distinct earnings statements covering the pay period ending March 4, 2005. RX 8 at 19 and 20. In each of these paychecks, Complainant's salary was reduced from $2000 to $650. As a result, Complainant received $1300 during each of these two pay periods, which is $700 less than the required bi-weekly wage of $2000, so that he was underpaid $1400 ($700 x 2).

For the pay period beginning March 5, 2005 and ending March 18, 2005, Complainant has an earnings statement which shows that he received $725 for 29 hours of work. RX 8 at 21. In addition, a second earnings statement covering the same time period shows that he was paid $2000 for 80 hours of work. RX 8 at 22. The second earnings statement reflects a deduction marked "Advnce" in the amount of $1100, which reduced Complainant's salary from $2000 to $900. When this $900 is added to the salary payment of $725 which Complainant also received for this pay period, the total of $1625 is still below the required wage of $2000 by $375.

For the pay period beginning March 19, 2005 and ending April 1, 2005, Complainant has an earnings statement which shows that he received $750 for 30 hours of work. RX 8 at 23. A second earnings statement covering the same time period shows that he was paid $2000 for 80 hours of work. RX 8 at 24. These last earnings statements reflect year-to-date deductions for "Advnce" in the amount of $6500. RX 8 at 23 and 24.

As explained more fully above, I find that Respondent was not entitled under the regulations to unilaterally reduce Complainant's pay below his actual bi-weekly wage of $2000 for the pay periods ending February 18, March 4, and March 18, 2005. *See Mao v. George Nasser, d/b/a Nasser Engineering & Computing Services*, 2005-LCA-36, at 21-2 (ALJ May 26, 2006). Any unauthorized deduction taken from wages is considered by DOL to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment. C.F.R. § 655.731(c)(11). *See also Mao*, 2005-LCA-36, at 26. Respondent therefore owes Complainant $700 in salary for the pay period ending February 18; $700 for the pay period ending March 4; and $375 for the pay period ending March 18, 2005, for a total of $1775 in back wages. This amount is reduced, however, by the 22 hours of overpayment at $25.00 an hour ($550) as referenced above, for net back wages owed of $1,225 ($1775-$550). *See* 20 C.F.R. § 655.810(a) ("Upon a determination that an employer has failed to pay required wages, back wages shall be assessed, and shall be equal to the difference between the amount that was paid and the amount that should have been paid.").

Under the regulations, back pay is awarded to make the claimant whole, and "[s]uch relief can only be achieved if prejudgment interest is compounded." *Mao,* 2005-LCA-36, at 26

(citations omitted). Accordingly, Complainant's net back wage entitlement of $1,225 is subject to prejudgment compounded interest.

4. Did Respondent provide proper notice of the LCA?

Under 20 C.F.R. § 655.805(a)(5), an H-1B employer must provide notice of the filing of an LCA. *See also* 20 C.F.R. § 655.734. The employer must provide such notice in one of the two following manners. First, a hard copy notice of the filing of the LCA may be posted in at least two conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity). *See* 20 C.F.R. § 655.734(a)(1)(ii)(A). Secondly, electronic notice of the filing of the LCA may be posted by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B non-immigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed. *See* 20 C.F.R. § 655.734(a)(1)(ii)(B).

In addition, the employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B non-immigrant with a copy of the LCA certified by ETA and signed by the employer (or by the employer's authorized agent or representative). 20 C.F.R. § 655.734(a)(3).

Mr. Thorpe reported that Complainant's H-1B visa was "completed" on December 14, 2005, but Respondent did not provide Complainant with a copy until February 2005. Mr. Thorpe determined that this was a "minor technicality." RX 5 at 5. In addition, Mr. Thorpe found that although Complainant did not have a hard copy of the LCA, the LCA was posted electronically at the place of employment and Complainant had access to the posting. *Id*. Complainant substantiated the electronic posting. *Id.* Accordingly, Mr. Thorpe concluded that Respondent had not violated 20 C.F.R. § 655.734, since Respondent posted the LCA electronically. *Id.* at 6.

Complainant has not produced any evidence to rebut Mr. Thorpe's finding that Respondent's electronic position of the LCA complied with the requirements of 20 C.F.R. § 655.734. Accordingly, I find that no violation of the LCA notice requirements has been established.

5. Is Respondent liable for a civil monetary penalty?

The Administrator "may" assess civil monetary penalties up to $1,000 for non-willful violations and up to $5000 for willful violations of the INA. 8 U.S.C. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). "Willful" is defined as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to" the INA. 20 C.F.R. § 655.805(c). Seven factors may be considered in determining the amount of a monetary penalty: previous history of violations by the employer; the number of workers affected; the gravity of the violations; the employer's good faith efforts to comply; the employer's explanation; the employer's commitment to future compliance; the employer's financial gain due to the violations; or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

In this case, the Administrator concluded that Mr. Thorpe's investigation did not disclose any failure of Respondent to pay Complainant the required wages. Since no INA violation was found, no penalty was assessed. Under 20 C.F.R. § 655.840(b), an Administrative Law Judge ("ALJ") has the authority to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." The ALJ's authority to review the Administrator's assessment specifically includes a determination of the appropriateness of a civil penalty. *See Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-20 (ALJ May 19, 2004) (citing *Administrator v. Chrislin, Inc*., 2002 WL 31751948 (DOLAdm.Rev.Bd)).

Although I have concluded that Respondent violated the INA by taking unauthorized deductions from Complainant's wages, I find that there is no allegation or evidence that Respondent's conduct constituted a "willful" violation. In addition, there is no evidence in the record of previous violations by Respondent or that any worker other than Complainant was affected by Respondent's violation. Respondent's financial gain due the violation and the corresponding potential financial loss of Complainant were limited to $1775 in back wages. *Compare U.S. Dept. of Labor v. Quikcat.com, Inc.,* 2003-LCA-19 (ALJ June 9, 2005) (upholding civil monetary penalty for willful failure to pay $357,777.26 in required wages to fourteen H-1B workers); *Administrator, Wage and Hour Division v. Home Mortgage Company of America, Inc.*, 2004-LCA-40 (ALJ March 6, 2006) (upholding civil monetary penalty for willful failure to pay $513,036.56 in required wages to fourteen H-1B workers). In addition, I find that Respondent made good faith efforts to comply with the INA by paying Complainant the required wage for all hours he worked, including overtime.

Having considered the relevant factors, I find that the record does not support the assessment of a civil monetary penalty in this case.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent Infomerica shall pay back wages to Complainant Srikanth Dola in accordance with the foregoing findings for the period after February 4, 2005, until April 1, 2005 in the total net amount of $1,225.00.

2. Complainant Srikanth Dola is entitled to interest on the award of accrued unpaid salary at the applicable rate of interest which shall be calculated in accordance with 28 U.S.C. § 1961 and this Decision and Order.

3. The Administrator, Wage and Hour Division, Employment Standards Division, U.S. Department of Labor, shall forthwith make such calculations as may be necessary and appropriate with respect to back pay, and all calculations of interest necessary to carry out this Decision and Order, which calculations, however, shall not delay Respondent's obligation to make immediate payment to Complainant Srikanth Dola (the Prosecuting Party).

4. This Decision and Order shall supersede the Administrator's finding of no violation, which shall be deemed void and without further effect.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: **Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210**. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a). If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties